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CITATIONS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 625.

JAMES C. ROGERS,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable the Supreme Court of the United States of America:

Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the Supreme Court of Missouri in the above case. In this behalf, Respondent shows the following:

OPINION BELOW.

The opinion of the Supreme Court of Missouri (App. A of Petition) is reported at 284 S. W. 2d 467.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether the decision of the Missouri Supreme Court, made in accordance with its duty to rule upon an issue of the sufficiency of the evidence in the case, should be reviewed by this Court, when the decision does not evidence an abuse of discretion or judgment.

2. Whether a railroad employee engaged in interstate commerce sufficiently raises a question of negligence for a jury to decide by mere proof of an accident brought about by his own voluntary actions and inattention to his assigned work.

STATUTES INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C., Sec. 51 et seq.) are set forth in the Petition at pp. 50-53 (App. G, H, I, J).

STATEMENT.

This litigation involves an action for damages by a railroad section worker, engaged in interstate commerce, against his employer for injuries allegedly sustained in the course of his employment. In his pleadings (R. 2), Petitioner alleged negligence of the Respondent in failing to provide him with a safe place in which to work, and in failing to provide him with a safe method of work. Respondent denied the allegations of negligence and alleged contributory negligence as a cause of the accident (R. 5).

The alleged accident occurred on July 17, 1951, near Garner, Arkansas (R. 12). Petitioner was told by his foreman to burn weeds along the right of way while other mem-

bers of the section crew were to do some work three or four hundred yards north of Garner Crossing. Petitioner was to work north on the west side of the tracks from the crossing to where the other men were, and then work back to the crossing on the east side (R. 16, 28).

The vegetation was dead and dry, having been previously sprayed with a weed-killing chemical (R. 58, 60). Petitioner was given a torch consisting of a quart container filled with kerosene, with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick (R. 14). He walked about two and a half feet from the tracks and burned weeds to his left only. He had no trouble and was burning "just spots" (R. 57).

Petitioner testified that he had not burned weeds in that manner before (R. 15). The only evidence as to any other method was that the Petitioner had seen a machine used, which spouted flame onto the right of way (R. 16), but it had not been used during his employment and he knew nothing about its operation other than that he saw it pass along, some time before he went to work for the railroad (R. 84, 85). The other testimony (uncontradicted) showed that the machine's use had been discontinued because it spread uncontrolled fire upon the ties, right of way and adjoining fences and property, requiring the section men to fight the spread of the fire (R. 300, 301). With the advent of modern chemicals the machine had been converted to spray weed killer and the dead weeds were then burned with less fire with the use of the hand torch. This was the usual method of removing excess vegetation from the right of way for some considerable time prior to Petitioner's accident, and the method being used by him at the time.

Petitioner worked north for thirty to forty-five minutes experiencing no difficulty (R. 16, 18, 57). He came to a

point thirty or thirty-five yards south of a drainage culvert when he heard a train whistle. The train was coming from the south. He testified that usually the foreman called the coming of trains, but he had not told Petitioner of this one (R. 26). Nevertheless, Petitioner testified that he heard the train coming in plenty of time to do what he wanted to do, and the fact that he was not previously told of it had no bearing on the later events (R. 61, 62).

Upon hearing the train whistle, Petitioner left the fire and trotted north to the culvert to watch the train for "hotboxes." He said that the foreman had given standing orders to the crew to watch all passing trains for hotboxes (R. 20), but he did not construe the foreman's orders to mean that he should ignore his fire to watch the train, and he knew that tending the fire was his primary duty (R. 88, 89, 90).

From the time he heard the train whistle (some distance south of Garner Crossing) Petitioner never again looked at the fire which he was supposed to be tending. He knew that the passing train would cause some wind, but he did not think it would bother the fire too much (R. 88).

Having reached the culvert Petitioner stood watching the train until half or two-thirds of it was past him. He then felt heat on his face and turned and saw the fire close to him and smoke in his face. He threw his left arm over his eyes, and as he turned he walked backwards, rapidly, and in so doing walked onto the culvert and slipped on the gravel on the top of the culvert and fell, sustaining injuries (R. 23).

He knew the drainage culvert was there when he ran to it, he saw it when he ran to it, and knew that he was standing next to it; but when the smoke got into his eyes he forgot about it (R. 63, 67).

When Petitioner walked backwards onto the culvert he slipped on gravel which had been placed as ballast for the

ties (R. 67). He said that the ballast had slipped or shaken down so that there was an incline on the culvert instead of a flat, level surface such as he had been walking on, along the tracks.

The jury was instructed to find for Petitioner if they found his accident was proximately caused by defendant's negligence in that the place of work and method of work were unsafe.

The jury's verdict was for the plaintiff for Forty Thousand Dollars (R. 426).

Respondent's after-trial motions were overruled and, upon an appeal to the Supreme Court of Missouri, that Court reversed the case, because Petitioner had not offered sufficient evidence to show that the culvert was an unsafe place of work, or that the method of burning weeds was unsafe. The Court further held there was insufficient evidence to raise a question of fact as to whether the construction of the culvert was a proximate cause of the Petitioner's accident and injuries.

ARGUMENT.

I.

There Is No Important Question of Federal Law or Conflict of Decisions.

The Missouri Supreme Court had before it, in briefs and in oral arguments, all of the issues which Petitioner now seeks to raise by further hearing by this Court. The State court weighed the arguments, the evidence and the law applicable to such evidence. It unanimously held that, under the applicable federal decisions, the Petitioner did not submit sufficient evidence to raise a question of negligence on the part of the Respondent railroad.

Petitioner now seeks to have this Court review the considered opinion of the able judges of the Missouri court. In short, Petitioner is asking for Certiorari merely because this Court may possibly differ in its judgment of the facts.

As stated in **Brady v. Southern R. Co.**, 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, there is no doubt but what this Court is charged with the duty of assuring litigants under this Act that they will receive similar treatment in all states. But by the same token, the **Brady** case holds that where, as here, a state's jury system requires the court to determine the sufficiency of evidence to support a finding, it is the duty of the appellate court, in accordance with the practice in the state, to enter judgment notwithstanding the verdict, or as was done in this case, to achieve the same result by reversal (320 U. S., l. c. 479, 480, 88 L. Ed., l. c. 242, 243).

We respectfully submit that whether this Court would approve or disapprove the State court decision is not so much an issue as whether it **should** review the opinion at

all. The case involves an accident which occurred in Arkansas. The Petitioner lived and worked there, as did all other witnesses in the case, save the medical experts who examined Petitioner for the purpose of testifying. The suit was brought in Missouri, which Petitioner had a right to do. Indeed, Petitioner could have chosen any one of several jurisdictions in which to bring his action. But when he so chooses a jurisdiction, does he not also choose to submit his case to the sound wisdom of the judges comprising the courts therein?

As above stated, there is no doubt that all cases arising under the Federal Employers' Liability Act must be decided in accordance with the federal decisions, regardless of where the action is brought. There is no doubt that the cases arising under the Federal Employers' Liability Act must be decided according to the law as expressed by this Court, and this Court must review cases, wherein variances from the federal decisions sometimes occur, in order to preserve uniformity in cases arising under the Act. But when Congress entrusted the handling of railroad employees' suits to State courts, did it not also entrust to the judges of the State courts at least such issues as the sufficiency of evidence? It is incumbent upon the trial and appellate judges of every jurisdiction to rule on the question of the sufficiency of evidence whenever the matter is properly raised. When a court then decides such an issue we submit that a review of its decision is entirely unwarranted, unless the decision constitutes an abuse of discretion and judgment, shocking to the conscience of this Court.

The principle could not be better expressed than it was by Mr. Justice Frankfurter in his noteworthy dissent in **Stone v. New York, C. & St. L. R. Co.**, 334 U. S. 407, 410, 97 L. Ed. 443, 445, wherein he said:

> "Uniformity of direction in fitting the myriad diversity of circumstances to the applicable standards is

essential. It is a duty which ultimately belongs to this Court and one which it is fitted to discharge. To assess the unique circumstances of a case is quite a different matter. And for the decisive reason that right and wrong are not objectively ascertainable, that in fact there is no right and wrong when two equally competent and equally independent judges, equally devoid of any bias or possessed of the same bias, could by the same reasoning process reach opposite conclusions on the facts.

". . . Congress has seen fit to allow this action to be brought in the State courts and to forbid removal of a case to the federal court even when diversity of citizenship exists. (These cases in the State courts run into the thousands.) In thus entrusting the enforcement of the Federal Employers' Liability Act to the State courts it presupposed, as a generality, the competence of the judiciaries of the States, their professional capacity to enforce the Act and their self-critical fairness toward its purposes . . . Congress could hardly have assumed . . . that this Court must reverse the State judges merely because we and they differed, where difference was more than permissible, was inevitable, concerning whether or not a particular unique set of facts made out a case of negligence."

When this matter was presented to the Supreme Court of Missouri it became incumbent upon the able judges of that court to determine whether the facts in the record raised a question of negligence. It was their duty to do so. While several recent decisions of this Court have urged greater latitude in allowing juries to decide even questionable cases of negligence, certainly there has been no mandate removing the power or the duty of the State court to decide, as a matter of law, whether the facts in a particular case were sufficient to submit to a jury. Here, the Missouri court has not strayed from the sound authorities of

the federal courts. Its conclusion was based on well-founded, recent federal cases. Its decision does not evidence a variance from any federal rule of law under the Federal Employers' Liability Act, nor is there a problem presented as to any conflict of federal decisions involved in this case. The Missouri court has given grave consideration to the applicability of the cases urged by counsel in support of their respective positions. Those cases which Petitioner now cites to this Court were before the Missouri court and considered by it. The decision is not without logic and judgment, but is based upon well-founded reasoning and the law as declared by this Court. We respectfully submit that review on the mere chance that this Court, upon again re-examining the facts in evidence, might not reach the same conclusion, even by the same reasoning process, is not warranted, and the writ should be denied.

II.

The Decision Below Is Clearly Correct.

There were but two acts of negligence charged against the Respondent by pleadings. The place of work and method of work were alleged to have been unsafe and the cause of Petitioner's injuries.

The place of work was alleged to be unsafe because the gravel ballast on top of the culvert, on which Petitioner slipped, had shaken and become loose and sloping instead of absolutely flat and smooth. The gravel was no doubt properly placed as ballast, according to Petitioner (R. 67), but he said that when he walked upon it backwards, blindly and rapidly, the gravel rolled under his foot causing him to fall. If Petitioner's view of the case is correct, every railroad in the United States would be required to maintain a walkway along every mile of its line, wide

enough and level enough and safe enough for every employee to walk along, backwards and with his arm over his eyes, even over drainage culverts which are intended to allow water to pass under the railroad right of way rather than to be used as walkways.

It is to be noted at the outset, as did the Supreme Court of Missouri (284 S. W. 2d, l. c. 472), that the condition of the drainage culvert was not shown by the evidence to have been unsafe for the ordinary use to which it could be expected to be put, including the duties, if any, which require workmen to walk across it. For all that is shown in the record, and Petitioner did not contend otherwise, any employee who was walking forward in a normal manner, looking where he was walking, could have walked across the culvert with absolute safety. At best, the evidence tends to show only that there was some danger in attempting to walk across the culvert in the manner Petitioner did at the time of his accident, without any evidence that it could reasonably be expected or anticipated that someone might attempt to do so.

The State court was manifestly correct in holding that foreseeability of an accident is a proper test of negligence and of proximate cause. In relying upon **Frizzell v. Wabash R. Co.**, 8 Cir., 199 F. 2d 153, the Court held (284 S. W. 2d, l. c. 472) that it cannot be logically said that a reasonable and prudent person could assume that loose gravel or crushed rock shifted down on the shoulder at the culvert by vibration of trains would subject section men to an unreasonable hazard, accustomed as they should be to moving over tracks, ties and ballast in their multiple duties. We submit that the State court's reasoning is sound especially where, as here, Petitioner was walking backwards, rapidly, with his arm over his eyes, at the time he slipped and fell (R. 23). Certainly, a reasonable and prudent employer could not anticipate such action and could

not conceivably provide any place of work safe for such manner of walking.

Petitioner relies heavily upon **Bailey v. Central Vermont R. Co.**, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, but the facts in the **Bailey** case are quite obviously different from those in the case at bar. There, the danger in the place of work existed **at all times** because of the nature of the construction of the place of work, and constituted a danger even when the place was used in the normal and expected manner. This is not our case. Here, there is no evidence that the place where Petitioner was required to work was not entirely suitable and safe for its ordinary, intended, and anticipated use. It was only when the Petitioner walked across the culvert backwards, blindly, and rapidly that he slipped and fell. In **Brady v. Southern Ry. Co.**, 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, where the defendant had in use a rail which was worn and defective, but which was sufficient for the ordinary and intended use, this Court held there could be no liability on the defendant for the use of such rail even though if the rail had not been used plaintiff might not have been injured. The failure to provide against the bare possibility of an accident is not actionable and where the railroad's facilities are put to an extraordinary, unusual and unforeseeable test, there is no liability.

We believe Petitioner's claim that he was required to follow an unsafe method of work is wholly illusory because the method of firing the weeds (as distinguished from the fact that the weeds had been fired) had nothing to do with his injury. The Supreme Court of Missouri (284 S. W. 2d, l. c. 472) aptly disposed of this part of Petitioner's case as follows:

> "Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burn-

ing weeds. See and compare Fore v. Southern Ry. Co., 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous."

We might add that Petitioner did not allege (R. 2) and did not instruct (R. 419) on any supposed negligence in the fact of burning weeds, as distinguished from the method of burning them. We will, however, briefly discuss the evidence on this supposed issue.

The method of burning the weeds with a hand torch was the only method shown by the evidence to be available and practicable. As distinguished from the facts in **Stone v. New York, C. & St. L. R. Co.**, 334 U. S. 407, 97 L. Ed. 443, where the foreman had a choice of methods to perform the work, here the only practicable method of burning the weeds at the time of the accident was the method Petitioner used. Petitioner testified that a considerable time before he ever went to work for the railroad he had seen a weed-burning machine which spouted fire out on the right of way. The machine passed along as he stood some distance away watching it (R. 16). He had no knowledge of its operation or of the duties required of the section workers connected with its operation (R. 84, 85). The other testimony (R. 300, 301), which was entirely uncontradicted, came from the foreman, who was the only man in the section crew old enough to remember the use of the machine. He explained that the railroad did in fact use such a machine in years gone by, but it created considerable difficulty because it threw fire in great quantities onto the right of way, ties, and fences which spread into adjoining pastures. The section workers were then required to fight such uncontrolled fires, thereby being exposed to far greater dangers from fire than is evidenced in this case.

With the advent of modern chemicals, the use of the fire machine was discontinued and the machine was converted so that it sprayed weed killing chemicals. After the vegetation died the section workers then burned the weeds by using the hand torch. As Petitioner testified, this only required the men to burn weeds "in spots". Certainly this method cannot be said to constitute an unreasonable hazard.

Petitioner now claims, for the first time, that his "inexperience" was something that should have been taken into consideration by the foreman when he assigned Petitioner the task. In the case of **Fore v. Southern Ry. Co.**, 4 Cir., 178 F. 2d 349, where an employee of the railroad was injured in attempting to remove a nut with a wrench, and alleged negligence of the defendant because it was ordinarily done with an acetylene torch, the court held (l. c. 353) that it was a matter of common sense and ordinary experience that there was no reasonably foreseeable danger when a young man of considerable size and weight, in perfect health, is ordered to unscrew a small nut with the universally accepted tool for that purpose. By the same reasoning, we can hardly believe that a 24-year old man from a rural area of Arkansas (R. 8 and 9) would require experience in order to burn spots of weeds without incurring danger to himself, especially when he was provided with an appliance which kept him six feet away from the fire at all times.

Moreover, Petitioner had no difficulty with his work and was getting along all right until he left his fire and ignored it to watch the passing train for hotboxes (R. 16, 18, 57). He said he did so because of a previous general order given by the foreman to the crew to watch all trains for hotboxes. Yet Petitioner knew, by his own admission, that this general order did not mean he was to leave a fire unattended and unwatched in order to watch a passing train. He did

not construe the order to be an excuse to leave the fire. By his own testimony he knew it was his primary duty to tend the fire (R. 88, 89, 90).

True, the train which came by was not announced to Petitioner by the foreman, but by his own testimony the fact that it was not announced caused him no surprise. He had plenty of time after hearing the whistle to do what he intended to do, and he said that the lack of previous notice had no bearing on the later occurrences (R. 61, 62). Petitioner did not charge any negligence on the part of the foreman in failing to announce the train or in directing him to perform a task which he was incapable of doing (R. 2 et seq.).

The State court, therefore, correctly held that the facts did not present a question of negligence in providing an unsafe method of work. It could hardly be foreseen or anticipated by an employer, that, in using the hand torch to burn weeds, an employee (1) would ignore the fire which he had set in order to watch a train for hotboxes, although he knew it was his primary duty to watch and tend the fire, and (2) would, although he knew the train would fan the fire, simply misjudge how much effect the passing train would have on the fire, and (3) would place himself between an open and obvious culvert which he could see and knew was there, on one side, and the fire on the other, and (4) would continue to ignore the fire until it came close to him, and (5) would forget about the culvert and attempt to walk rapidly over it backwards with his arm over his eyes. An employer cannot reasonably be expected to anticipate and guard against every bizarre combination of circumstances which might produce an injury to an employee. Under the facts in this case, the Missouri Supreme Court could only follow the federal decisions in **Brady v. Southern Ry. Co.**, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239; **Fore v. Southern Ry. Co.**, 4 Cir., 178 F. 2d 349, supra, and **Chesa-**

peake & Ohio R. Co. v. Burton, 4 Cir., 217 F. 2d 471, which affirmatively establish the principle that under the Federal Employers' Liability Act, a place of work or method of doing work does not become unsafe by a voluntary action on the part of the employee who is injured.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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culvert. He also testified that he slipped on gravel which had been properly placed as ballast.**

All of the other members of the section crew were called to testify on behalf of Respondent. They stated that they had never seen a flame throwing machine used to burn the right of way since they had been working on the railroad. They had all been required from time to time to burn weeds and they said that the usual method was to burn weeds with a torch after the weeds had been killed by chemicals (R. 45, 59, 87). They also testified that they were familiar with the culvert on which petitioner claims he fell and that it was no different from any other culvert on their section or on the railroad (R. 49, 51, 54, 58, 69, 73, 87).

Mr. Leo Howdershell, the foreman, testified that he had been section foreman for twenty-five years and had worked for the railroad thirty years (R. 60). On the morning of July 17, 1951, he said he asked petitioner, whose back previously had been hurting him, how he was feeling, and petitioner replied that he was feeling pretty good (R. 62, 66, 67). Mr. Howdershell asked him if he felt like he could take the torch and burn the right of way where the weed sprayer had killed the weeds along the shoulder.

** (R. 24) Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes.

Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir.

Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir.

Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes.

Q. You have a dump and on top of that you put this gravel? A. Yes, sir.

Q. They call it "ballast," don't they? A. Yes.

Q. On top of that you lay the ties? A. Yes.

Q. And the rails. It was that ballast you were walking on at the time you slipped? A. Yes.

Q. It was that ballast that slipped from under your feet, wasn't it? A. Yes.

(R. 60). Petitioner said "Yes" he could do that. They stopped the motor car at Garner crossing and petitioner got off and started burning weeds. The rest of the crew went about a quarter of a mile north of the crossing, turned the motor car off and started replacing ties. About 10:00 or 10:30 A. M. petitioner came up to him and said that his back was hurting (R. 61).

At no time did petitioner tell the foreman anything about a culvert being involved and the foreman first heard about the culvert on the Sunday following the accident, when an attorney representing petitioner came to him to take a statement. The attorney told him that petitioner slipped and fell on the culvert (R. 64). Respondent's claim agent came to see the foreman on the 25th, and the distance from the culvert to the place where the torch had been found was measured with a tape (R. 65). It was hundred sixty feet north of the culvert (R. 66).

Mr. Howdershell, the foreman, said that he was familiar with the machine that had been used to burn the right of way and that it had not been used since 1949 or the early part of 1950. It was no longer used because it caused too much fire, sometimes burning adjoining property, pastures and woods. When it was used the section crew would have to follow along and put the fires out. If there was wind, the fire would spread onto the machine. The section crew had to fight the fires. After 1949 or 1950, the machine was converted into a sprayer to poison the weeds and kill them (R. 68, 69). After the weeds were killed they were burned off with a torch and it has been done that way ever since. He testified that they now have a lot less fires as a result of this method and it cuts down the amount of fire fighting (R. 69).

Mr. Howdershell said that the edge of the ballast is lined up straight. The crews try to maintain the ballast on a straight line (R. 75, 76). The only time they disturb

the rock, however, is when they dress it up after they have done a day's work at a particular place (R. 77). The shoulder is not maintained in particular, however, as a path or walkway (R. 73).

The case was submitted to the jury under instructions relating to whether or not the place of work provided by respondent was unsafe and dangerous, and whether or not the method of doing the work adopted by respondent was unsafe and dangerous (R. 93). The jury returned a verdict in the sum of $40,000.00 (R. 97).

Respondent's after trial motions for judgment, in accordance with its prior motion for directed verdict, were overruled (R. 100). The respondent appealed to the Supreme Court of Missouri, which reversed the judgment (R. 101, 102), holding that petitioner had failed to show sufficient facts to raise a jury question as to an unsafe place of work, or an unsafe method of work, as being the proximate cause of petitioner's alleged injuries.

SUMMARY OF ARGUMENT.

The respondent was charged with negligence in two respects, and in two respects only—in failing to provide a safe place to work, and in adopting an unsafe method of work. In so charging the respondent with these acts of negligence the petitioner assumed the burden of proving sufficient facts to raise a jury question as to the alleged acts of negligence.

As to the place of work, the evidence showed that petitioner was injured when he walked rapidly backwards with his arm over his eyes across a drainage culvert on respondent's right of way. He said he was caused to fall because of loose and sloping gravel on top of the culvert (R. 2). There was no evidence that the culvert was improperly constructed or maintained. It was not pleaded or proved that the respondent had actual or constructive knowledge of the loose and sloping gravel, which petitioner says was there because of train vibrations. Furthermore, there was no evidence that it could have been reasonably foreseen that an employee of the respondent, in using the top of the culvert as a walkway, would attempt to cross it while walking backwards rapidly and blindly, and it was not shown by the evidence that a person walking in a normal and expected manner could not have safely walked across the culvert.

As to the method of work, it was shown that the respondent sprayed the vegetation along its right of way with a chemical weed killer so that the weeds would die and, thereafter, caused the weeds to be burned with a hand torch. This required the weeds to be burned only in small patches or "in spots", as the petitioner testified (R. 18). There was no other method more safe or more suitable shown by the evidence. Petitioner claimed no dif-

ficulty because of the method employed at the time, but to the contrary was performing his work with ease until he saw fit to leave his fire and stand next to the open and obvious culvert which he knew was there, in order to watch a passing train for hot boxes. He did so with the knowledge that his primary duty was to watch and tend the fire, and by his own testimony he had never construed any previous orders of his foreman to mean that he should leave his fire to watch a train for hot boxes. He also knew that the passing train would fan the fire in his direction, but he simply misjudged how much effect the train would have on the fire. Thus petitioner has failed to prove a better or safer method of burning weeds from the right of way and he does not contend it was negligence to burn the weeds. He has further failed to prove that the method of burning the weeds was the proximate cause of his accident.

Petitioner on this appeal has argued to the Court several grounds which he states are sufficient for reversal of the decisions of the Supreme Court of Missouri. Petitioner argues that he was inexperienced, that he was given conflicting orders, and that because of his inexperience he was unable to judge the distance to put between himself and the fire (which it was his duty to tend) in order to watch a passing train for hot boxes. These contentions, if borne out by the evidence, may conceivably have individually or collectively constituted a cause of action against respondent. But petitioner did not rely upon these acts of negligence which he now argues to this Court, for he neither stated them in his petition, nor submitted them to the jury which heard the case. Thus he should not now be heard to argue to this Court that, on allegations of negligence other than those upon which the case was tried, he may have been able to produce sufficient evidence to support a jury verdict.

It is therefore inaccurate to say that the Supreme Court of Missouri "reweighed the evidence," as claimed by petitioner. Petitioner, as a matter of law, failed to sustain the burden of proving the allegations of his pleading and of his submission to the jury. The Supreme Court of Missouri did not reweigh the evidence but merely distinguished the evidence relating to that which was pleaded, from the arguments relating to subjects not pleaded. The State Supreme Court in so doing was manifestly correct.

ARGUMENT.

Petitioner, as a matter of law, failed to sustain his burden of proving the Respondent negligent in furnishing him an unsafe or dangerous place of work and in adopting a dangerous or unsafe method of work, and now presents arguments relating to alleged acts of negligence not heretofore pleaded or made a part of the case.

The Culvert.

It is to be noted that petitioner charged respondent with negligence in two respects: (1) In providing an unsafe and dangerous place of work, and (2) in adopting an unsafe and dangerous method of work. As to the place of work, there is no contention by petitioner that his place of work was at all unsafe until he got to the point where it was necessary for him to cross the drainage culvert upon which he claims he slipped and fell.

It is the evidence in regard to this culvert which must be examined to determine whether or not, as a matter of law, there was a question of fact raised for a jury to decide. Petitioner alleged (R. 2) and claimed by his testimony (R. 33) that the culvert was covered with loose and sloping gravel. It was this which he contends constituted the danger in his place of work.

It is to be noted in this connection that it was nowhere pleaded or contended in the evidence, nor does petitioner now claim on this appeal, that this culvert was improperly constructed or that the maintenance of it was improper. Similarly, petitioner has never claimed that the respondent had any notice, actual or constructive, of any dangerous condition relating to the culvert. To the contrary, it is only claimed that the ballast which was properly placed on top of the culvert had presumably, by train vibrations,

shaken loose. When this took place or how it happened is neither alleged or shown by the evidence. Thus petitioner does not claim that the respondent was remiss in any of its duties of inspection or maintenance through which the supposedly dangerous situation might have been discovered and corrected in the exercise of ordinary care.

By the same token, although it is pleaded that the culvert, being covered with loose and sloping gravel constituted a dangerous and unsafe condition in petitioner's place of work, still the evidence in the case goes no further than to show that petitioner slipped and fell because of the loose and sloping gravel, at a time when he was attempting to walk across the culvert rapidly, backwards and with his arm over his eyes. There is no evidence, and petitioner does not now contend, that a person walking normally, looking in the direction in which he was walking, even performing the duties of burning weeds on the right of way, could not have walked across the culvert with absolute safety to himself. In short, there is not one word of testimony that the petitioner, in normal circumstances, could not have walked across the culvert with absolute safety. To put it simply, petitioner claims negligence on the part of the respondent because the evidence showed respondent's drainage culvert was not so constructed that petitioner, on this particular occasion, could walk across it backwards, blindly and rapidly, without slipping and falling.

Common sense tells us that the test made of the culvert in this case was unusual, not expected and not at all foreseeable. Not only did petitioner walk across the culvert backwards and blindly with his arm over his eyes, but he had forgotten about the culvert and presumably didn't know he was going across one (R. 23).

Assuming that an obligation to provide a safe place to walk across each and every drainage culvert on a railroad

system does exist, we submit that such duty extends only to the use of such walkway across culverts as could be reasonably foreseeable and intended or anticipated—that is, that such walkways would be used in a normal manner by persons walking forward and at least looking where they were walking.

In the recent case of **Frizzell v. Wabash R. Co.** (1952), 8th Cir., 199 F. 2d 153, a section foreman claimed injury when he slipped on loose and sloping gravel while removing a push car from the railroad tracks. A motor car had been placed on the only motor car set-off nearby and there was no set-off on which the push car could have been placed. The section foreman's foot slipped in the ballast causing him injury. He claimed the defendant company was negligent in furnishing him with an unsafe place in which to work because the footing was insecure, and in failing to provide an additional motor car set-off on which to place the push car. The Eighth Circuit Court of Appeals held against the plaintiff on both issues. In regard to the unsafe place in which to work, the Court concluded that such an assignment of negligence assumed that it was the duty of the defendant, in the exercise of reasonable care, to keep the cinder ballasting on each side of the tracks and adjacent to the end of the ties smooth and even at all times and places, including the period of time when the ties were being removed and replaced. The Court said (199 Fed. 2d 157, 158):

> " . . . *can it be logically said that a reasonably careful and prudent person would assume that the normal indentations in cinder ballasting caused by normal rainfall would furnish a hazard to section hands accustomed, as they had to be, to walking along and over such ballasting?* . . . We fail to find any reasonable grounds for the inference that defendant was negligent merely because slight unevenness in the surface of cinder ballasting was permitted to exist at

such places as the location of plaintiff's injury." (Emphasis added.)

The **Frizzell** case, we submit, is precisely in point. At best, petitioner's testimony in this case can be taken to show only that the ballast had been shaken down and caused an unevenness or slope across the culvert. Even if it was, there is no evidence that petitioner or other section men could not walk across it in a normal manner. A reasonably prudent employer could only foresee that the culvert, if it was to be used as a walkway, would be used by a person walking across it in a normal manner. The record is void of evidence that it was not safe for such purposes.

In his brief petitioner now claims that respondent owed petitioner the duty of providing a safe escape route from his emergency situation, and the duty to provide a safe place in which to work regardless of how fleeting the circumstances may be. But even under fleeting circumstances a master is only bound to provide that which is foreseeable and the failure to provide against the bare possibility of an accident is not actionable. In **Brady v. Southern Railroad Company** (1943), 320 U. S. 473, 64 S. Ct. 232, 88 L. Ed. 239, this Court held that a railroad cannot be held to be negligent where an extraordinary, unusual and unforeseeable test is made of its facilities, and liability must arise from negligence, not from injury under this Act. Respondent certainly had no way of knowing, or anticipating, that petitioner would stand next to the culvert in order to watch the train. Petitioner was not told to do so. He simply ignored his duty to watch and tend his fire, and in so doing chose for himself the place he was to stand. Had he stood elsewhere, no doubt, the accident would never have happened.

Thus it is not necessary to reweigh the evidence, as petitioner claims was done by the Supreme Court of Missouri

in order to reach the only logical conclusion regarding the place of work.

> *"The basis of liability under the Federal Employers' Liability Act is negligence and . . . it is still the duty of the Court to determine whether the plaintiff has produced any evidence of negligence on the part of the defendant, and if not to direct a verdict."* **Eckenrode v. Pennsylvania Railroad Company** (1947), D. C., 71 F. Sup. 764 (l. c. 766), affirmed 3 Cir., 164 F. 2d 966, *affirmed* 335 U. S. 329, 69 Sup. Ct. 91, 93 L. Ed. 41.

Giving petitioner every benefit of every doubt, the place of work still was not proved to have been unsafe for any normal, intended or foreseeable use. It was only shown that petitioner slipped and fell while attempting to walk rapidly, blindly and backwards over the culvert, and that he slipped because of some loose gravel. Since petitioner did not allege, nor does he now contend that respondent had any notice, actual or constructive, regarding the supposedly dangerous condition, he cannot now be heard to contend that his evidence was sufficient, in a legal manner, to give rise to a question of fact for a jury to decide.

Method of Work.

Respondent employed as its method of removing weeds from its railroad right of way the use of a chemical weed spray which caused the weeds to wither and die. Thereafter, as part of its method of removing the weeds from the right of way, respondent caused the dead weeds to be burned by one of its section men using a torch with a three-foot handle. In this instance the duty was assigned to petitioner. This was the sole method involved in this case. It was alleged that this method was dangerous and unsafe. The respondent denied this allegation. Contrary to the contentions made in petitioner's brief, the weeds were not "chemically prepared" so that they would "ignite

rapidly," except to the extent that they were simply dead weeds. It is a matter of common knowledge that it is most difficult to burn green growing vegetation.

There was no evidence of any other method more suitable or more safe. Petitioner attempted to inject into the case evidence that there was another method—that of the flame-throwing machine. It developed, however, by petitioner's own words that he knew nothing whatsoever about the use of such a machine, the section crew's duties, or any of the hazards relating thereto (R. 26, 27). On the other hand, the only witness competent to testify in regard to the use of the flame-throwing machine was the foreman, Mr. Howdershell. It had never been used during the term of employment of any of the section crew and they knew nothing about it. Mr. Howdershell, without contradiction, testified that the use of the machine was far more hazardous than the method of spraying the weeds and burning them off with a hand torch. He testified that the flame-throwing machine could not be controlled well. It would spread onto adjoining property and burn pastures, fences and the railroad ties. When there was wind the flame would be blown back on the machine, thus endangering the lives of the crew (R. 68). The machine was therefore converted to spray weed killer onto the right of way and the dead weeds thereafter were burned with a torch. By that method there was a lot less fire to contend with and the section workers had far less contact with the fire (R. 69). As petitioner himself testified, his job was only to burn weeds in small sections or "just spots" (R. 18). He would burn to his left only, a distance of about six feet from him, down the side of the dump, a distance of about two and one-half or three feet (R. 19).

Thus, we have a situation where the petitioner, by his own testimony, entirely disqualified himself as having any knowledge relating to the practicability of the only other method mentioned in evidence by which the vegetation

could be burned or removed from the right of way. The foreman, without contradiction, testified that the flame throwing method was far more hazardous and less desirable than the method employed at the time of petitioner's accident. Of course, the jury was not bound to believe the foreman's testimony. But disbelief of the foreman's testimony would not supply a want of proof, nor would the possibility alone that the jury might disbelieve the foreman's version make the case submissible. **Moore v. Chesapeake & Ohio Railway Co.** (1951), 340 U. S. 573, 578, 71 Sup. Ct. 428, 430, 95 L. Ed. 547, 550.

This is not a case, therefore, where the respondent's foreman had a choice of methods available to him and negligently adopted an unsafe method. The railroad is not obligated to adopt any particular means or method of performing the work so long as the method it does adopt is a reasonably safe one. **McGivern v. Northern Pac. Ry. Co.** (1942), 8 Cir., 132 F. 2d 213, 217; **Wolfe v. Henwood** (1947), 8 Cir., 162 F. 2d 998; **Brady v. Southern Railroad Company** (1943), 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239.

Moreover it is to be noted that the method of burning weeds caused petitioner no difficulty or danger. By his own statement he was not in the fire nor did he have a large amount of fire to watch. The difficulty was encountered when a train passed by, and respondent was not charged with negligence in running a train. When that happened he "quit firing" to watch the train for hot boxes, *yet he knew it was his primary duty to watch the fire* (R. 30). He said he did so because the foreman had instructed the crew to watch all passing trains for hot boxes, but at the same time he did not construe his foreman's orders to mean that he was to leave the fire which he had set in order to watch the train for hot boxes (R. 29).

He ran up to the culvert knowing the passing train would fan the fire in his direction (R. 28). He did not *think* the train would bother the fire very much (R. 29).

He *thought* he was far enough ahead of the fire (R. 14, 29). The record is void of any evidence that from the moment he heard the train whistle a quarter of a mile south of Garner crossing, when he "quit firing" and trotted some thirty-five or forty yards to the culvert (R. 19), that petitioner at any time looked back at his fire to see what was happening to it until he felt the heat on his face.

Again, it is not necessary to "reweigh the evidence." Taking petitioner's own testimony the question becomes: In spraying and burning vegetation along the right of way, could it be reasonably foreseen by respondent that an employee would, (1) ignore the fire to watch a train for hot boxes although he knew it was his primary duty to watch and tend the fire, and if so, (2) although he knew the passing train would fan the fire in the direction in which it was going, could it be reasonably foreseen that he would *assume* the train would not bother the fire much and *misjudge* the necessary distance to get ahead of the fire in order to ignore it and stand watching the passing train and, if so, (3) that he would place himself between an open and obvious culvert which he could see and knew was there on one side and the unwatched, unattended fire on the other, and, if so, (4) that he would continue to ignore the fire while one-half or two-thirds of the train went by, until the fire came dangerously close to him, and, if so, (5) that he would forget about the culvert which he had seen and which he knew was there and attempt to walk rapidly over it, backwards, with his arm over his eyes, to escape the fire and smoke? We respectfully submit that it takes a long stretch of imagination to believe that a reasonable and prudent employer would or should, in the exercise of ordinary care, anticipate such a bizarre coincidence of circumstances.

For all that is shown, had the petitioner let the train go by and continued to tend the fire, *which he knew was his pri-*

main duty (R. 30), the accident would never have happened. There is nothing in the record to the contrary and petitioner did not make any statement that would lead one to believe that he would have been in any danger had he continued to watch the fire. This is not mere argument, for petitioner said that he did not construe the foreman's orders to watch trains for hot boxes to mean that he should ignore the fire which he had set (R. 29).

In the case of **Fore v. Southern Railway Company** (1949), 4th Cir., 178 F. 2d 349, where an employee of the railroad was injured in attempting to remove a nut with a wrench, and alleged negligence of defendant because ordinarily it was done with an acetylene torch, the Court held (l. c. 353):

> "Here Fore offered no evidence whatever even to prove any element of foreseeable danger in carrying out the order in question. Surely it would seem a matter of common sense and ordinary experience that there was no reasonably foreseeable danger when (under the facts of this case) a young giant, 6 feet 5 inches tall, weighing 235 pounds, in perfect health, is ordered to unscrew a small nut, easily within his reach with a wrench, which is the almost universally accepted tool for that purpose."

The **Fore** case is most frequently cited for the legal proposition that "an injury which was not foreseen, and could not be reasonably anticipated as the probable result of an act of imputed negligence, is not actionable" (178 F. 2d 349, 353). Certainly it is a matter of common sense and ordinary experience that the plaintiff, a man 25 years of age at the time of the injury, should have been able to properly tend a small grass fire without incurring danger to himself, especially when he was provided with an appliance which kept him away from the fire at all times.

In **Wolfe v. Henwood** (1947), 8th Cir., 162 F. 2d 998, another case arising under the Federal Employers' Liability Act, the plaintiff was required in the course of his duties to bail out an accumulation of fuel oil and water from a concrete catch basin, and in so doing his clothes became saturated with the fuel oil. Later, there being no cleansing facilities available, plaintiff used gasoline to remove the fuel oil from his clothes, and in seeking to destroy the waste with which he had applied the gasoline to his clothes, he set fire to it. When he did so the flame set fire to his glove, and he slapped the side of his leg, setting fire to his clothes and sustaining severe burns which caused his death. In holding that there was no negligence because the accident was one which could not reasonably have been foreseen, the Court said (l. c. 1000):

> "We fail to perceive a basis for a finding of negligence in failing to furnish a pump to remove the oil and water from the pits. The evidence goes no farther than to establish that it would have been as practical to remove the oil by mechanical device as it was to remove it by dipping. It was, of course, within the realm of the possible that an accident would occur during the process of removing the oil, regardless of method used, but there was no evidence that this chance was unduly enhanced by the method used. Defendant had a choice of methods, neither one of which was inherently dangerous and cannot be charged with lack of due care in the choice made."

Similarly, in the case at bar, the evidence goes no farther than to establish that the burning of the weeds at one time was done by the use of a flame throwing machine, but there is no evidence supporting, and plaintiff's own testimony refutes, his contention that the chance of injury was enhanced by the method of burning the weeds with a hand torch.

A case close in principle to the one at bar is that of **Gill v. Pennsylvania Railroad Company** (1953), 3rd Cir., 201 F. 2d 718, cert. denied 346 U. S. 816, 74 S. Ct. 27, where it was alleged that the defendant railroad was negligent in directing plaintiff, whose knee injury was known to the defendant, to work under a rack which was so low that it required plaintiff to hold his injured knee in an awkward position. When he backed out from under the racks and stood up he thought he was clear of the racks but struck his head, and was injured. Plaintiff testified that he had never worked in a boxcar with racks in it before. In holding that the plaintiff had made no case, the Court said (l. c. 721):

> "The crux of plaintiff's argument seems to be that the negligence of the defendant in sending the plaintiff to the car caused the accident, because he would not have misjudged the distance if he had not been there. But that does not constitute legal proximate cause. To the contrary, it is almost a hornbook illustration of no proximate causation."

Almost precisely the same thing happened here. The plaintiff was getting along perfectly all right until he stopped tending the fire to watch a train go by. He knew that there would be some wind following the train (R. 28). He did not *think* it would bother the fire too much and *thought* he was far enough away from the fire so that he could ignore it (R. 14, 29). In other words, he simply *misjudged* the effect of the wind caused by the train on the fire—he knew there would be some—and misjudged the distance to put between himself and the fire. Certainly, it cannot be said that the hand torch method of firing the right of way was the proximate cause of plaintiff's error in judgment and lack of attention to his work.

Furthermore, petitioner presumably could have stood any place else on the right of way with absolute safety

to himself *even if he had chosen to ignore his fire.* Certainly the method of burning the weeds cannot be said to give rise to a duty to anticipate that petitioner might voluntarily stand between the fire and the culvert, instead of on the other side of the culvert, or elsewhere on the right of way. It has been held many times that the Federal Employers' Liability Act does not make a railroad company an insurer against personal injuries to its employees. Before the employee may recover he must prove that the railroad's negligence was the proximate cause of his injury. **Chesapeake & Ohio R. Co. v. Thomas** (1952), 4th Cir., 198 F. 2d 783, 788, cert. den., 344 U. S. 921, 73 S. Ct. 387, 97 L. Ed. 709. There must be more than a scintilla of evidence which tends to show negligence on the part of the railroad. **Fore v. Southern Ry. Co.** (1949), 4th Cir., 178 F. 2d 349; **Brady v. Southern Ry. Co.**, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239. It has also been held that a place of work or method of doing business does not become unsafe by a voluntary action on the part of the employee who is injured. **Chesapeake & Ohio R. Co. v. Burton** (1954), 4th Cir., 217 F. 2d 471. See also **Atlantic Coast Lines R. Co. v. Coleman** (1950), 182 F. 2d 712.

We respectfully submit that there was no foreseeable danger to the petitioner in asking him to burn small patches of grass on the right of way with a hand torch. The hand torch itself caused plaintiff no injury. The use of it in no way harmed him. The case involves the simple matter of an employee who failed to pay proper attention to the duties to which he was assigned and, under the cases cited above, the method employed was not the proximate cause of petitioner's injury. We respectfully submit that on the facts of the case at bar, and on the law cited herein, no submissible case was made.

Petitioner's New Contentions.

Petitioner now virtually concedes at pages 20, 21 and 27 of his brief, that the Supreme Court of Missouri correctly held the place of work and the method of work were not proved to be unsafe or dangerous. Petitioner says, at page 21 of his brief:

> "These *truisms* take on a different meaning, however, when we consider the manner in which they were being used at the time of petitioner's injury. For illustration, a cow is a docile animal; an oil lantern is a simple appliance; barns are common place structures; but we learned through Mrs. O'Leary that they cannot be used successfully in close and dangerous proximity to each other." (Emphasis ours.)

It may be that had respondent tied the hand torch to the tail of Mrs. O'Leary's cow and set it to burning the weeds it would have been foreseeable that the cow would get itself into trouble. But respondent did not employ dumb animals to burn weeds on its right of way. It employed a twenty-five year old man, presumably of reasonable and ordinary intelligence. Furthermore, petitioner did not plead or submit to the jury that he was in any wise incapable of performing a simple task with a simple apparatus such as the hand torch.

At page 3 of his brief, petitioner again claims that one of the issues in the case relates to petitioner's lack of experience in firing weeds along the right of way and his ignorance as to the method employed at the time of performing the work. It may be that petitioner had no previous experience and had not seen the right of way burned in the manner or method assigned to him. But petitioner did not allege this to be an act of negligence on the part of respondent nor was this issue submitted in petitioner's verdict directing instruction. Yet it is petitioner's only justification for contending now that there was a jury issue in

this case, notwithstanding the fact that for the usual and intended purposes and circumstances, the place of work and method of work were, by the evidence, indisputably shown to have been reasonably safe. Compare the pleadings in **Atlantic Coast Line R. Co. v. Coleman** (1950), 5th Cir., 182 F.2d 712.

At page 16 of his brief, petitioner says that "respondent created an emergency situation by compelling the petitioner to watch for hot boxes at a time when it was highly dangerous for him to do so. It was the imposition of these concurrent and conflicting duties that made the respondent's method of work an unsafe and dangerous one." There are two answers to this argument. First, it is contradicted by petitioner's own testimony. He testified that he knew his primary duty was to watch and tend the fire (R. 30) and that he did not construe his foreman's previous orders to mean that he should ignore his fire in order to watch for hot boxes (R. 30). In the second place, petitioner did not allege in his pleading that the method of doing the work was unsafe because of conflicting orders, nor did he submit this question to the jury. In short, the petitioner has never, until this appeal, contended that there was any negligence on the part of respondent in giving supposedly conflicting orders which created a dangerous situation to him.

The respondent was never charged with negligence in setting the fire and petitioner does not so contend at this time. Respondent is not charged with negligence in operating a train past where petitioner was required to work and petitioner does not so contend at this time. If petitioner were too inexperienced to competently perform the work, it should have been alleged in his pleading and submitted in his instructions. If petitioner were inexperienced and unable to distinguish between his duties to watch and attend the fire which he had set and the previous order of the foreman to watch passing trains for hot boxes, it

should have been pleaded and submitted to the jury. If petitioner were so inexperienced that he could not safely judge the distance to put between himself and the fire which he had set, it should have been pleaded and submitted to the jury. These are the elements upon which petitioner now contends he made a case for the jury. But these were not the elements upon which the respondent was sued or upon which the case was submitted to the jury.

It is elementary in our system of law that one who is sued has a right to know the charges upon which he is being sued, and to be held liable only upon those charges and not upon any others. If respondent was to be charged with negligence in creating an emergency, giving conflicting orders, assigning an inexperienced employee to perform a task which he was incompetent to perform safely to himself, these issues should have been pleaded and submitted. They were not, and petitioner's arguments to this Court on these issues should be rejected.

Wherefore, we respectfully submit that under the pleadings, the evidence and the instructions to the jury, the Supreme Court of Missouri correctly held petitioner failed to make a submissible case.

CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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